

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

ENTERCOM COMMUNICATIONS CORP.,

Plaintiff and Respondent,

v.

ROYCE INTERNATIONAL BROADCASTING
CORPORATION et al.,

Defendants and Appellants.

C059601

(Super.Ct.No.
99AS04202)

This is the most recent dispute arising from a contract for the sale of a radio station. In a prior appeal involving the lawsuit, this court affirmed an "interlocutory judgment" awarding specific performance of a contract requiring defendants Royce International Broadcasting Corporation, Royce International Broadcasting Company, and Edward R. Stolz (collectively, Royce) to sell a radio station, KWOD-FM, to plaintiff Entercom Communications Corporation (Entercom). (*Entercom Communications Corp. v. Royce International Broadcasting Corporation et al.* (May 5, 2003, C041067 [nonpub. opn.].) In another appeal, we affirmed an amended final judgment awarding costs

incidental to specific performance. (*Entercom Communications Corporation v. Royce International Broadcasting Corporation et al.* (Sept. 5, 2007, C051799 [nonpub. opn.].)

At issue in the current appeal by Royce is a postjudgment order terminating the escrow account into which Entercom deposited the \$25 million purchase price (we will round cash values exceeding \$1 million to their nearest \$10,000) and dividing the interest that accrued on the deposit since 2002. Royce contends the trial court erred in finding Royce had forfeited its right to complain that too little interest was earned on the escrow deposit, and in declining to adjust the parties' respective distributions to account for the fact that Entercom was permitted to withdraw \$2.65 million of the accrued interest before the final accounting and distribution.

For reasons that follow, we shall affirm the order.

BACKGROUND

The "Interlocutory Judgment" and Escrow Account

In a prior appeal involving this lawsuit, we affirmed the trial court's interlocutory judgment of April 30, 2002, awarding specific performance of the contract for Royce to sell the radio station to Entercom for \$25 million. (*Entercom v. Royce, supra*, C041067.)

Paragraph No. 7 of the interlocutory judgment contains the only directions regarding the escrow account at issue in this appeal. In pertinent part, it states: "No later than five (5) business days after the entry of this Judgment, Entercom shall place the sum of \$25 million . . . in an interest-bearing escrow account (the 'Escrow Account') with an escrow company of financial

institution in Sacramento, California (the 'Escrow Agent'). After the Closing Date, [Royce] may withdraw up to \$15 million . . . from the Escrow Account. The remaining sum in the Escrow Account shall be held by the Escrow Agent until further Order of this Court."¹

Entercom then entered into an escrow agreement with Northern Trust Bank of California. As relevant here, they agreed that Entercom would deposit \$25 million in escrow funds with the bank and, "[a]s directed in writing by Entercom, the Bank shall hold or invest the Escrow Funds in (i) an interest-bearing money market deposit account maintained at the Bank, and/or (ii) in a money market investment fund managed by the Bank or one of its affiliated entities and consisting of securities issued by the United States government. . . . *No less frequently than monthly, the Bank shall pay to Entercom all of the interest earned, in the case of a money market deposit account investment, or received, in the case of a money market investment fund investment, in connection with the Escrow Funds.*" (Italics added.) Between 2002 and February 2008, the Bank paid to Entercom \$2.65 million in interest in accordance with the portion of the escrow agreement italicized above.

Royce was not a party to the escrow agreement, and Royce did not receive a copy of the escrow agreement between Entercom and Northern Trust Bank of California. However, bank statements from the escrow account were periodically forwarded to Royce's counsel.

¹ Royce never made any withdrawals from the escrow account.

One such statement, for the period February 1 to February 29, 2008, is in the record on appeal. It does not state the rate at which the escrow deposit was accruing interest, but it does show the amount of interest accrued for that month: \$94.64. It also shows a "Payment[] To Or For Benefit Of Client" in the amount of \$70,301.12 for that period, and an overall balance in the account of \$24,821,441.78.

The Equitable Accounting and Amended Final Judgment

Following remittitur from the first appeal, the trial court conducted the second phase of the bifurcated trial, to determine compensation incidental to specific performance under the legal principle that the parties should be placed, as nearly as possible, in the financial position they would have occupied had the contract been performed on the contract date (i.e., the buyer is entitled to a credit against the purchase price for rents and profits from the time the property should have been conveyed and the seller is entitled to receive the value of lost use of the purchase money during the period performance was delayed). (*Stratton v. Tejani* (1982) 139 Cal.App.3d 204, 212.)

Following a bench trial, the trial court issued a "Ruling on Equitable Accounting," finding that, during the period performance of the contract was delayed, Entercom's lost profits from the radio station were \$11.46 million, and Royce's loss of interest on the purchase price was \$7.63 million (calculated at the rate of Treasury Bills "given the volatility and decline of other investments in recent years"). Offsetting Entercom's lost profits against Royce's lost interest, the court concluded that Entercom was entitled to

a reduction of \$3.83 million from the \$25 million purchase price, for a net price of \$21.17 million.

The trial court's equitable accounting was embodied in the amended final judgment, from which both sides appealed, and which we affirmed. (*Entercom Communications Corporation v. Royce International Broadcasting Corporation et al.*, *supra*, C051799.) *Motion to Terminate Escrow Account and Distribute Proceeds*

After the parties' respective appeals from the amended final judgment were rejected, Entercom filed a "Motion for Termination of Escrow Account and Distribution of Proceeds." At that time, the escrow account had accrued \$2.72 million in interest, of which the bank had already disbursed \$2.65 million to Entercom.

Entercom asked the trial court to order the escrow account distributed "in accordance with the amended final judgment and principles of equity." In Entercom's view, equity demanded that the court award 40.4 percent of the accrued interest to Entercom and 59.6 percent to Royce.

In opposition, Royce argued Entercom breached the interlocutory judgment when, among other things, it deposited the \$25 million purchase price in an account which "earned a low rate of interest" and entered into an escrow agreement allowing it to unilaterally withdraw accrued interest. Royce urged the court to award damages to Royce for the breach or declare a "total failure of consideration" and to set aside the specific performance judgment in Entercom's favor. Alternatively, Royce asked the court to divide the accrued interest in the same manner as the amended final judgment allocated

the \$25 million principal in escrow account: 84.53 percent to Royce, and 15.47 percent to Entercom.

Following an unreported hearing, the trial court took the matter under submission and ultimately granted Entercom's motion to terminate the escrow account and distribute its proceeds. In so doing, it adopted Royce's argument that the \$2.72 million in accrued interest should be divided using basically the same percentages the court used in the amended final judgment to allocate the escrow principal: 15.48 percent to Entercom and 84.52 percent to Royce. (The 0.01 percent difference from the percentages urged by Royce is not explained.)

The trial court reasoned that, "[g]iven the passage of almost 6 years" since the escrow account was established, Royce had "waived" the right to complain that the escrow failed to earn a higher rate of interest. It also overruled Royce's objection to the fact that interest from the escrow account had been periodically disbursed to Entercom during the escrow period because, "[w]hile this distribution appears to have been inappropriate, there is insufficient evidence before the court to calculate the effect of this."

DISCUSSION

In reviewing the trial court's disposition of accrued interest on an escrow account under these circumstances, we apply a deferential abuse of discretion standard. (See, e.g., *Stratton v. Tejani*, *supra*, 139 Cal.App.3d at p. 213 [proper for trial court to exercise its discretion in conducting "an equitable accounting for the intervening events during the period performance was delayed"].)

"A trial court abuses its discretion when it applies the wrong legal standards applicable to the issue at hand" (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 85) and, if the trial court decides the case by employing an incorrect legal analysis, reversal is required regardless of whether substantial evidence supports the judgment. (See *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436.)

Royce omits any reference in its opening brief to the standard of review and argues instead, in its reply brief, that "Entercom failed to establish that the trial court did not commit reversible error." Thus, Royce appears to misunderstand that it, not Entercom, bears the affirmative burden on appeal to establish *the existence of* reversible error. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573 ["Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error"].)

As we shall explain, Royce has not met its burden.

The Interest Rate

The trial court rejected, as "without merit," Royce's claim that Entercom breached the terms of the interlocutory judgment by establishing an escrow account which earned too little interest. Specifically, the court found that Royce "ha[d] waived any objection" to "the rate of interest being earned" in light of "the passage of almost 6 years" since the escrow account was established.

Royce contends "[t]here was no evidence on this subject for the Court to have held a waiver." The contention fails.

Until recently, appellate courts in California used the terms "waiver" and "forfeiture" interchangeably in discussing the effect of a lack of assertion of a right in the trial court. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371; *People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.) Strictly speaking, a waiver is the intentional relinquishment or abandonment of a known right, whereas a forfeiture results from the failure to timely assert a right; thus, "forfeiture" is the correct legal term to describe Royce's loss of its right to challenge the terms of the escrow account, although the older cases describing this right may refer to it as a waiver. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2 [stating the correct legal term for loss of right based on failure to assert it in a timely fashion is forfeiture, not waiver].)

"No procedural principle is more familiar to this court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]' [Citation.]" (*People v. Saunders, supra*, 5 Cal.4th at pp. 589-590; cf. *In re S.B., supra*, 32 Cal.4th at p. 1293.)

Here, there was evidence from which the trial court reasonably could have concluded that Royce forfeited its right to challenge the rate at which interest accrued on the escrow deposit. Correspondence in the record between counsel in June 2002 shows Royce was aware then that Entercom had deposited the purchase price "several weeks ago," and Entercom's attorney averred in support of the motion to dissolve the escrow that "[d]uring the entire time [since August 2002] I have

handled this case for Entercom, I have never received any complaint by counsel for Royce to the terms, location, interest rate, or any other aspect of the escrow account established pursuant to the April 2002 Interlocutory Judgment." Entercom's attorney also averred that, after opening the escrow account, he "forwarded copies of the account statements from Northern Trust periodically to counsel for Royce[.]" A copy of one such statement, dated February 29, 2008, is in the record and, while it does not state the rate of interest earned, it does show the amount of accrued interest during that period (\$94.64) and that the account balance essentially unchanged from the date it was opened in 2002.

Thus armed with information about the amount of interest earned, from which it could have inquired in the trial court about the interest rate, Royce neither asked Entercom about the interest rate nor sought in the trial court to discover it. Consequently, the trial court did not err in concluding Royce forfeited its right to complain that the escrow account earned too little interest.

Division of the Accrued Interest

During the six-year term of the escrow account, Entercom periodically withdrew interest as it accrued, thereby preventing the interest from compounding. Royce characterized this action as a breach of the interlocutory judgment and asked for damages.

The trial court agreed with Royce that the interim interests payments from the escrow account to Entercom were "inappropriate," but found insufficient evidence to calculate its effect.

Royce insists on appeal that the trial court could, and should, have "follow[ed] through in determining the damages from [Entercom's]

receiving the interest which would have been the interest that would have been earned on the interest it received." Royce argues the court could have performed a calculation that "would have entailed the application of an interest rate on th[e] amount" of interest withdrawn by Entercom. We are not persuaded.

The trial court's ruling on the sufficiency of the evidence to support Royce's damages claim was made after a hearing on Entercom's motion at which a court reporter was not present. Thus, Royce cannot attack the trial court's finding because the appellate record does not contain a transcript of the hearing. Because Royce provides us with only a partial clerk's transcript of the proceedings, we must treat this as an appeal "on the judgment roll" (*Allen v. Toten* (1985) 172 Cal.App.3d 1079, 1082-1083; *Krueger v. Bank of America* (1983) 145 Cal.App.3d 204, 207) and "'conclusively presume that the evidence is ample to sustain the [court's] findings" [Citations.]" (*Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 154.) Our review of the judgment is limited to determining whether any error "appears on the face of the record." (*National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 521; see Cal. Rules of Court, rule 8.163.)

Lacking a court reporter's transcript of the hearing, we cannot evaluate Royce's claim that the trial court erred in concluding there was insufficient evidence to calculate how the interest on the escrow deposit might have compounded had Entercom not withdrawn interest as

it accrued. Because this is a judgment roll appeal, we must presume the trial court correctly assessed the state of the evidence.

DISPOSITION

The judgment is affirmed.

_____, SCOTLAND, P. J.

We concur:

_____, NICHOLSON, J.

_____, ROBIE, J.